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No. 92-1944

In the Supreme Court of the United States

OCTOBER TERM, 1993

FACCHIANO CONSTRUCTION CO., ET AL., PETITONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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23 pp

QUESTION PRESENTED

Whether the court of appeals erred in upholding the Department of Labor's order debarring Facchiano Construction Company, Michael Facchiano, Jr., and John Facchiano from contracting with the federal government for three years based on their violations of labor standards under Davis-Bacon Related Acts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 987 F.2d 206. The opinion and order of the district court (Pet. App. 21-34) are unreported. The decision of the United States Wage Appeals Board (Pet. App. 35-54) and the decision and order of the administrative law judge (Pet. App. 55-82) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1993. The petition for a writ of certiorari was filed on June 7, 1993 (a Monday). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An investigation by the Department of Labor (DOL) and the Federal Bureau of Investigation revealed that, between 1982 and 1984, petitioner Facchiano Construction Company paid wages for work done on construction projects financed by the Department of Housing and Urban Development (HUD) at rates below those required by the Housing and Community Development Act of 1974 (HCDA), 42 U.S.C. 5301, 5310, and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. 327 *et seq.*, two of the Davis-Bacon Related Acts.[1] Pet. App. 3-4. The investigation also revealed that the company's payrolls, which had been certified as correct by petitioner John Facchiano, stated that employees received a higher wage than was actually paid, that employees were misclassified, that overtime hours were underpaid, that employees were not paid for all the hours that they worked, and that the names of certain employees had been omitted. *Id.* at 3 n.2, 38.

As a result of that investigation, Facchiano Construction Company paid more than $128,000 in back wages and benefits to 20 employees. Pet. App. 38. Additionally, a two-count criminal information was filed against the company and petitioner Michael Facchiano, Jr., the company secretary. Both defendants ultimately entered pleas of guilty to mail fraud in violation of 18 U.S.C. 1341 for their conduct in

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[1] The Davis-Bacon Related Acts set forth labor standards requirements under some 60 federal statutes administered by federal agencies. See 29 C.F.R. 5.1.

sending falsified payroll statements through the mail.[2]

Thereafter, HUD filed an administrative complaint against the company and Michael Facchiano, Jr., seeking to debar them from participating in any HUD-funded programs pursuant to 24 C.F.R. 24.6 (1985). Pet. App. 4. After determining that the convictions for mail fraud constituted grounds for debarment under HUD regulations, HUD's Board of Contract Appeals considered certain mitigating evidence in determining the appropriate sanction. *Id.* at 120-124. Based on its review of the documentary evidence and briefs, the Board then ordered the debarment of the company and Michael Facchiano, Jr., from participation in HUD programs for 18 months.[3] *Id.* at 124-125. The debarment period ended on November 15, 1986. *Id.* at 125.

2. During the pendency of the HUD debarment proceeding, DOL commenced its own proceeding, pursuant to 29 C.F.R. 5.12(a)(1) (1986), to debar the company, Michael Facchiano, Sr., Michael Facchiano, Jr., and John Facchiano from contracting with the federal government as a whole. Pet. App. 4.[4]

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[2] Michael Facchiano, Jr., was sentenced to six months' imprisonment and a five-year period of probation, and was fined $2,000. The company was also fined $2,000. Pet. App. 38.

[3] The HUD Board denied the company's and Facchiano's request for an oral hearing, noting that when a HUD debarment is based on a criminal conviction, the Board must make its decision based exclusively on the documentary evidence and briefs. Pet. App. 119-120, citing 24 C.F.R. 24.5(c)(2) (1985).

[4] After the HUD debarment, petitioners brought suit in federal district court seeking to enjoin the DOL's debarment action on the ground that it was precluded by principles of res judicata and collateral estoppel. Pet. App. 4. The district

Following an administrative hearing, the ALJ debarred the company from participating in any government contracts for a period of 18 months. Pet. App. 55-82.

The ALJ rejected petitioners' claim that DOL's debarment proceeding was barred by the doctrines of res judicata and collateral estoppel by virtue of HUD's earlier debarment proceeding. Pet. App. 74-77. The ALJ relied in part on the fact that the HUD debarment related only to HUD projects, while the DOL debarment would have government-wide effect. *Id.* at 76-77. The ALJ also relied on the fact that the HUD debarment was based on the criminal convictions of the company and Michael Facchiano, Jr., while the DOL debarment would be based directly on petitioners' violations of the Davis-Bacon Related Acts. *Ibid.*

The ALJ further found that the company had committed aggravated and willful violations of the HCDA and CWHSSA, and that debarment was therefore appropriate. Pet. App. 79-80. The ALJ ruled that the individual officers of the company—petitioners Michael Facchiano, Sr., Michael Facchiano, Jr., and John Facchiano—were not subject to debarment, because the applicable regulation authorized debarment only of a "contractor or subcontractor," not "contractors or subcontractors and their responsible

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court held that collateral estoppel and res judicata did not apply, and granted summary judgment for DOL. *Id.* at 83-93. Citing petitioners' failure to exhaust their administrative remedies, the court of appeals affirmed the district court's judgment. *Id.* at 94-112. The court vacated the district court's ruling on the preclusion issue, however, in order to permit DOL to address that issue in the first instance. *Id.* at 108.

officers," as under the regulation applicable to debarment under the Davis-Bacon Act. 29 C.F.R. 5.12(a)(1) and (2) (1986); see Pet. App. 77-79. The ALJ recognized, however, that a debarment order would not "be of any real effect" unless it was directed against the individual petitioners, because the company was already inactive. *Id.* at 77.

3. The Wage Appeals Board affirmed in part and reversed in part. Pet. App. 35-54. First, the Board agreed with the ALJ that the principle of res judicata did not preclude the DOL debarment proceeding. *Id.* at 43-50. The Board considered critical the fact that "it is the Secretary of Labor, and not HUD, who has primary responsibility for enforcing the labor standards requirements of * * * the HCDA and the CWHSSA and for determining whether government-wide debarment is warranted for violations of those requirements." *Id.* at 44-45. The Board also relied on the facts that (1) the DOL debarment, unlike the HUD debarment, was government-wide, and (2) the DOL debarment was based on the labor standards violations themselves, whereas the HUD debarment was based primarily on the criminal convictions. *Id.* at 45. In the Board's view, those distinctions demonstrated that the HUD and DOL proceedings did not involve the same cause of action. *Ibid.*[5]

The Board reversed the ALJ's holding that debarment of the individual petitioners was not permissible under the DOL regulations governing Davis-Bacon Related Acts debarments. Pet. App. 46-50. The Board

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[5] The Board found that petitioners had not raised a claim of collateral estoppel, but noted that, in any event, its rejection of the claim of res judicata would also apply to a claim of collateral estoppel. Pet. App. 43 n.1.

rejected the notion that the plain language of 29 C.F.R. 5.12(a)(1) (1986) precludes debarment of corporate officers merely because it authorizes debarment of any "contractor or subcontractor" without referring specifically to corporate officers as well. Pet. App. 48. The Board found that other procedural debarment provisions referring specifically to "persons" and "responsible officers" supported the Secretary's reading of Section 5.12(a)(1). Pet. App. 48-49, citing 29 C.F.R. 5.12(b)(1) and (c), 6.2(d). The Board also relied on the remedial purposes of the Related Acts debarment regulation, noting that the debarment procedure would be "robb[ed] * * * of its effectiveness" if it were construed to preclude debarment of responsible individuals. Pet. App. 50. Accordingly, the Board adhered to its consistent interpretation of the regulation as permitting debarment of responsible officials in appropriate cases. *Ibid.*

The Board also reversed the ALJ's decision to impose only an 18-month debarment. The Board found that a full three-year debarment of all petitioners was appropriate in light of the absence of any extraordinary circumstances that would dictate a shorter period. Pet. App. 50-52.[6]

4. Petitioners then brought suit in federal district court seeking to enjoin the DOL debarment and reverse the decision of the Wage Appeals Board. The district court granted summary judgment in favor of DOL and affirmed the decision of the Board in its entirety. Pet. App. 21-34.

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[6] One board member dissented from that conclusion, reasoning that an additional three-year debarment was inappropriate in light of the previous 18-month HUD debarment. Pet. App. 53-54.

5. The court of appeals affirmed in pertinent part. Pet. App. 1-20. The court rejected petitioners' contention that res judicata and collateral estoppel precluded DOL's debarment proceeding. *Id.* at 9-14. Citing *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402 (1940), the court found that DOL and HUD were not in privity during their respective debarment proceedings for purposes of res judicata principles. Pet. App. 10. The court explained that, under *Sunshine Coal*, the critical issue is the authority delegated to each agency to bind the government in a final adjudication. Pet. App. 10-11. The court then determined that HUD had no authority to debar contractors from participating in any non-HUD federal contracting programs or to debar contractors based on Related Acts labor violations. *Id.* at 11-12. DOL, on the other hand, possessed authority to debar contractors from all federal programs based on Related Acts violations. *Id.* at 12. Thus, the court concluded that HUD's debarment action did not preclude DOL's subsequent action, because HUD "did not have 'authority to represent [the United States'] interests in a final adjudication of the issue in controversy.'" *Id.* at 12-13, quoting *Sunshine Coal*, 310 U.S. at 403.

Furthermore, the court found that DOL's and HUD's causes of action were not the same for purposes of res judicata, nor were the issues identical for purposes of collateral estoppel. Pet. App. 13. The court noted that the HUD proceeding was based on the criminal conviction of Michael Facchiano, Jr., while the DOL proceeding also debarred Michael Facchiano, Sr., and John Facchiano, based on their own aggravated and willful violations of labor

standards requirements. *Ibid.* Moreover, the court emphasized that the two proceedings were based on different statutes and different material facts and evidence, and that the demand for recovery in each proceeding was different. *Id.* at 13-14.

Finally, the court affirmed the district court's conclusion that debarment of individuals is authorized by 29 C.F.R. 5.12(a)(1) (1986). Pet. App. 14-17. Noting that an agency's interpretation of its own regulation is entitled to substantial deference, the court found "no error in DOL's interpretation that § 5.12(a)(1) includes debarment of individual responsible officers." *Id.* at 15. The court explained that the Wage Appeals Board has consistently interpreted the regulation to permit debarment of responsible officers, and concluded that the Board's interpretation was reasonable in light of the remedial goals of the Related Acts. *Id.* at 16. The court acknowledged that the Davis-Bacon Act debarment regulation specifically mentions "responsible officers" while the Related Acts regulation does not, but declined to place any weight on that difference in language because the two regulations were not drafted at the same time. Pet. App. 17. Moreover, the court observed that it could "discern no rational reason for including debarment of responsible officers in one regulation, but not the other." *Id.* at 16. Accordingly, the court affirmed the DOL debarment of the company and its responsible officers for knowingly violating Related Acts labor standards.[7]

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[7] The court also rejected petitioners' argument that Executive Order No. 12,549, 3 C.F.R. 189 (1987), which provides that debarment under any federal program will have government-wide effect, precluded DOL from debarring

ARGUMENT

The court of appeals, applying the principles established in this Court's decision in *Sunshine Coal*, correctly held that neither res judicata nor collateral estoppel precluded DOL from ordering debarment of petitioners. The court also properly held that DOL regulations allow the debarment of individual responsible officers. Those holdings do not conflict with any decision of this Court or of any other court of appeals, and they present no issue of general or continuing importance warranting review by this Court.

1. Petitioners contend (Pet. 10-18) that DOL was precluded by the doctrine of res judicata from debarring them, following the prior HUD debarment of the Facchiano Construction Company and Michael Facchiano, Jr. That contention is without merit.

The doctrine of res judicata "precludes the parties or their privies from relitigating issues that were or could have been raised" in a previous action. *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Thus, a final judgment on the merits bars further claims by parties or their privies on the same

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petitioners from all government contracts after HUD had debarred the company and Michael Facchiano, Jr., only with respect to HUD projects. The court explained that the Executive Order provides no private right of action and did not become effective until long after DOL had begun its proceedings. Pet. App. 5-9. The court agreed, however, that the record was insufficient to support the Wage Appeals Board's debarment of Michael Facchiano, Sr. *Id.* at 17-19. Accordingly, the court vacated the district court's ruling on that issue and remanded for further proceedings. Petitioners do not challenge those aspects of the court of appeals' decision in this Court.

cause of action. *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979).

The doctrine of res judicata applies to administrative decisions when "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). In the administrative context, as elsewhere, however, the crucial questions for purposes of res judicata are whether there is privity between the parties in the two proceedings against whom the doctrine is being asserted, and whether the second suit is based on the same cause of action as the first. See *Nevada* v. *United States*, 463 U.S. 110, 129-130 (1983); *Sunshine Coal*, 310 U.S. at 402. Here, the court of appeals correctly held that HUD and DOL were not privies with regard to their respective debarment actions, and that the DOL debarment action was not based on the same cause of action as the HUD proceeding.

a. In *Sunshine Coal*, this Court set forth the test for determining whether two government agencies are in privity for purposes of res judicata. In that case, the appellant originally sought a determination from the National Bituminous Coal Commission that the appellant was exempt from a federal excise tax because its coal was not "bituminous" within the meaning of the relevant statute. 310 U.S. at 390. The Commission denied the exemption on the ground that the appellant's coal was bituminous, and that determination was upheld on appeal. *Id.* at 390-391.

In the meantime, the Collector of Internal Revenue sought payment of the taxes, and the appellant filed

suit in federal court seeking to enjoin collection of the taxes. 310 U.S. at 391. In considering whether the prior determination that the appellant's coal was bituminous was binding in the second action, this Court looked to whether privity existed between the Commission and the Collector of Internal Revenue. *Id.* at 402-403. The Court described the test for determining privity between federal agencies as follows: "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy." *Id.* at 402-403. Applying that test to the circumstances before it, the Court found that the Commission had clear authority "to make the determination of the status of [the] appellant's coal under the Act." *Id.* at 403. Accordingly, the Court concluded that the Commission "represented the United States in that determination," and thus the first proceeding "bound the United States, as well as the appellant." *Ibid.*

In this case, by contrast, HUD did not have full authority to represent the interests of the United States in a final adjudication of all issues relating to petitioners' debarment. As the court of appeals correctly observed (Pet. App. 11-12), HUD lacked authority to debar contractors from non-HUD programs[8] or to debar contractors for Related Acts

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[8] At the time of the HUD debarment proceeding, HUD's debarment regulations defined "Debarment" as "exclusion from a participation in HUD programs for a reasonable, specified period of time." 24 C.F.R. 24.4(a) (1985) (Pet. App. 133); see also 24 C.F.R. 24.5(a) (1985) (Pet. App. 134).

labor violations.[9] Rather, that authority rested with DOL. See 29 C.F.R. 5.12(a)(1). Thus, because the "issue in controversy" in the DOL proceeding was whether petitioners should be debarred from participating in all government contracts based on their violations of the labor standards provisions of the HCDA and the CWHSSA, "HUD, even though it acted as a representative of the United States, did not have 'authority to represent [the United States'] interests in a final adjudication of the issue in controversy'" in the DOL proceeding. Pet. App. 12-13, quoting *Sunshine Coal*, 310 U.S. at 403.

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[9] Instead, the grounds for debarment under HUD's regulations included: conviction of a criminal offense committed as an incident to obtaining or performing under the contract; conviction of certain specified crimes, including mail fraud; violation of contract provisions; and any other causes that were of "such serious compelling nature, affecting responsibility," as "to warrant debarment." 24 C.F.R. 24.6 (1985); see Pet. App. 134.

We note, however, that HUD's debarment regulations have since been substantially revised in response to Executive Order No. 12,549, *supra*, which directed each Executive agency to participate in and implement a government-wide system for nonprocurement debarment and suspension. 24 C.F.R. 24.100; see generally *id.* §§ 24.100-24.510. Accordingly, if petitioners had been debarred by HUD after October 1, 1988 (the effective date of the revised regulations), the HUD debarment would have had government-wide effect, *id.* §§ 24.100(a), 24.200(a), and such debarment could have been based directly on a willful violation of the Davis-Bacon Related Acts labor standards, see 24 C.F.R. 24.305(b)(3). Under the revised regulations, moreover, "[w]hen more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the [debarment] decision." *Id.* § 24.115(c). Thus, as a practical matter, the preclusion issue on which petitioner seeks review in this case is not likely to recur.

Petitioners err in contending (Pet. 13-14) that DOL and HUD were in privity because HUD's debarment order was issued pursuant to its shared responsibility for enforcing federal labor standards under Reorganization Plan No. 14, 3 C.F.R. 1007 (1949-1953 comp.). See Pet. App. 126. Contrary to petitioners' assumption, HUD did not base its debarment order on any authority it may possess to enforce federal labor standards. Rather, HUD proceeded under its own debarment regulations —regulations that were "issued under section 7(d) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(d))," 24 C.F.R. 24.2 (1986)—and did not purport to apply DOL debarment provisions at all. See Pet. App. 120-121 (citing and applying HUD debarment provisions). Accordingly, HUD and DOL were not in privity for res judicata purposes.

b. Petitioners also assert (Pet. 16-18) that HUD and DOL asserted the same cause of action in their respective debarment proceedings. Petitioners err, however, in assuming that the causes of action asserted in the two proceedings were the same merely because they both arose, in a broad sense, from the same general set of facts. As this Court has long recognized:

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. * * * The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the

> result of these in a legal wrong, the existence of which, if true, they conclusively evince.

Baltimore S.S. Co. v. *Phillips*, 274 U.S. 316, 321 (1927) (internal quotation marks and emphasis omitted). Thus, the appropriate inquiry is not solely "whether the material facts * * * are the same," but also "whether the acts and the demand for relief are the same" and "whether the theory of recovery is the same." Pet. App. 13.

It is readily apparent that the HUD and DOL debarments were based on separate and distinct "legal wrongs." The HUD debarment was based on the criminal convictions of Facchiano Construction Company and Michael Facchiano, Jr., for mail fraud, while the DOL debarment proceeding was based on petitioners' willful and aggravated violations of the labor standards requirements. Pet. App. 13-14, 44-52, 120-121.[10] Accordingly, "[w]hat was material to the HUD proceeding was the criminal conviction and mitigating factors that would demonstrate [that] the Company was now a 'responsible' party that could again be entrusted with HUD contracts," whereas "[t]he facts material to the DOL proceeding were

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[10] Moreover, as the court of appeals observed (Pet. App. 13), the parties to the two debarments were not the same, because the HUD debarment applied only to Michael Facchiano, Jr., and the company, whereas DOL also sought debarment of Michael Facchiano, Sr., and John Facchiano. That difference in parties serves to highlight the fact that the cause of action was different in each proceeding: HUD could proceed only against the company and Michael Facchiano, Jr., because it was seeking debarment based solely on prior criminal convictions; DOL, on the other hand, sought debarment based on petitioners' willful violations of federal labor standards, and accordingly was able to proceed against all four petitioners.

actual evidence of the violations, the extent and nature of the misclassification and underpayments, evidence of previous violations and falsification of the certified payrolls." *Id.* at 13-14.

Moreover, the demand for recovery in the two proceedings was different. DOL properly sought a government-wide debarment under its regulations, whereas HUD's regulation allowed that agency to seek debarment only from HUD programs. Pet. App. 14. Thus the causes of actions in the two proceedings were not the same for purposes of res judicata.[11]

2. Petitioners also contend (Pet. 20-23) that the court of appeals erred in holding that the DOL regulations permit debarment of individual corporate officers for Davis-Bacon Related Acts violations. That contention involves only a narrow question of regulatory interpretation upon which no other court

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[11] Petitioners also contend (Pet. 18 n.6) that their debarment was precluded by the doctrine of collateral estoppel. Under that doctrine, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*, 440 U.S. at 153; see *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979). As discussed above, however, HUD and DOL are not the same party or in privity for purposes of preclusion, and thus the doctrine of collateral estoppel has no application. Moreover, petitioners err in suggesting (Pet. 18 n. 6) that the remedial issue in both debarment proceedings was the same. The issue of HUD's appropriate response to the mail fraud convictions of Facchiano Construction Company and Michael Facchiano, Jr., is plainly distinct from the issue of DOL's appropriate response to petitioners' willful and aggravated violations of federal labor law, and thus collateral estoppel would be inapplicable even if HUD and DOL were in privity.

of appeals has expressed a view, and accordingly it is not appropriate for review by this Court. In any event, the decision below properly applied settled principles of deference to agency regulatory interpretation.

The Davis-Bacon Act debarment provision, 29 C.F.R. 5.12(a)(2) (1986), authorizes the debarment of "contractors or subcontractors and their responsible officers." The parallel provision applicable to the Davis-Bacon Related Acts, 29 C.F.R. 5.12(a)(1) (1986), refers only to the debarment of "contractor[s] and subcontractor[s]." As the court of appeals correctly observed (Pet. App. 17), however, no particular significance can be attached to the absence of the term "responsible officers" in Section 5.12(a)(1) of the regulations, because the two regulatory provisions were drafted at different times.

If anything, the reference to "responsible officers" in the Davis-Bacon regulation bolsters the Secretary's interpretation of subsection 5.12(a)(1), because there is "no rational reason for including debarment of responsible officers in one regulation, but not the other." Pet. App. 16. Both the Davis-Bacon Act and the Related Acts "are designed to ensure the cooperation of the employer, largely through self-enforcement, in complying with the [statutory] requirements," and the Secretary's interpretation of his regulation rationally advances those statutes' shared purposes. Pet. App. 16. Indeed, debarment of responsible officers "may in fact be the only realistic means of deterring contractors from engaging in willful [labor] violations based on a cold weighing of the costs and benefits of non-compliance." *Ibid.* (internal quotation marks omitted). Thus, rejection

of the Secretary's construction of the regulation would frustrate the purpose of the statutory scheme that the regulation is intended to implement.

Moreover, the Secretary has consistently read 29 C.F.R. 5.12(a)(1) (1986) to authorize the debarment of individual responsible officers. See Pet. App. 16, 50. Even if Section 5.12(a)(1) were ambiguous, therefore, the Secretary's reasonable and consistent view would be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). See also *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1175-1176 (1991); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). Because the Secretary's conclusion that Section 5.12(a)(1) encompasses responsible officers is both reasonable and consistent with the regulatory language and purpose, the court of appeals correctly upheld the debarment of Michael Facchiano, Jr., and John Facchiano.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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